STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN CARTER,

Defendant-Appellant.

UNPUBLISHED
March 16, 2006

No. 258435
St. Clair Circuit Court
LC No. 04-001397-FH

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for resisting and obstructing a police officer, MCL 750.81d. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve 15 months' to 15 years' in prison. Because we are not persuaded by any of defendant's arguments on appeal, we affirm.

First, defendant argues that testifying police officers' references to defendant's past conduct denied him a fair trial and that defense counsel was ineffective for failing to object to this testimony. Defendant failed to preserve the argument that he was denied a fair trial; therefore, his claim is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 700 (1999). Defendant's ineffective assistance of counsel claim is limited to the existing record because he failed to move for new trial or an evidentiary hearing. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). The determination regarding whether counsel was ineffective is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Police witnesses have a special obligation to avoid venturing into such forbidden areas while testifying. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). However, "an isolated or inadvertent reference to a defendant's prior criminal activities will not result in reversible prejudice." *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973).

The record reveals that the police officers' allegedly improper testimony did not deny defendant a fair trial. Unlike in *Wallen, supra,* and *People v McCartney*, 46 Mich App 691, 692-693; 208 NW2d 547 (1973), on which defendant relies, the testimony did not reveal that defendant had a record of incarceration, that he had spent time in jail, or that he had committed other specific criminal acts. Rather, the testimony merely revealed that the officers were familiar with defendant and had files "documenting him." At most, the testimony raised a weak

inference that defendant had a record of criminal activity. In the absence of a deliberate attempt on the part of the prosecutor to reveal defendant's criminal past, these minor and isolated references did not deprive defendant of a fair trial. See *People v Steiner*, 136 Mich App 187, 196; 355 NW2d 884 (1984).

Defendant bears the burden of overcoming the presumption that counsel was effective, and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, defendant must show that counsel's performance fell below an objective standard of reasonableness under the circumstances and according to professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313, 521 NW2d 797 (1994). Next, defendant must show that this performance so prejudiced him that he was deprived of a fair trial. *Strickland*, *supra* at 687-688; *Pickens*, *supra* at 309. To establish prejudice, defendant must show a reasonable probability that but for counsel's errors the outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW3d 694 (2000).

Defense counsel's failure to object to the allegedly improper testimony did not fall below an objective standard of reasonableness because the comments did not reveal any prior criminal activity. Defense counsel did object to testimony that the police had files documenting defendant on the ground that the testimony was unresponsive. The trial court sustained the objection. Two comments merely referenced the fact that the officers were familiar with defendant, and did not reveal any prior criminal activity. The remaining comment was solicited by defense counsel in an effort to discover why an undercover agent was not used to attempt a purchase. The testifying officer responded that such a ploy would not work because "certain offenders are more knowledgeable about the game." Defense counsel would have been required to object during his own cross-examination, and may have chosen to let the comment slide rather than drawing attention to it. Defendant has not overcome the presumption that defense counsel's refusal to object to the challenged comment was anything but legitimate trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Accordingly, defendant has not shown that defense counsel's performance fell below an objective standard of reasonableness. Additionally, as noted above, defendant has failed to show that the admission of the allegedly improper testimony so prejudiced him that he was denied a fair trial. Defendant has failed to show that defense counsel was ineffective.

Next, defendant argues that there was insufficient evidence to convict him of resisting and obstructing a police officer. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

MCL 750.81d(1):

> [A]n individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony. . . .

MCL 750.81d contains no reference to a lawful arrest, and does not include this element. *People v Ventura*, 262 Mich App 370, 375-376; 686 NW2d 748. The *Ventura* Court observed that MCL 750.81d clearly "states only that an individual who resists a person the individual knows or has reason to know is performing his duties is guilty of a felony." *Id.* at 376.

Sufficient evidence showed that defendant knew or had reason to know that he was being approached by police officers and that the officers were performing their duty. Defendant immediately fled the scene, and was chased by officers who shouted "police" and "stop." Three of the four officers chasing defendant were wearing black T-shirts with the word "Sheriff" written in white letters across the front and back of the shirt. The evidence demonstrates that defendant resisted the officers, and obstructed them by failing to comply with their orders to stop. Sufficient evidence supported defendant's conviction. *Fennell*, *supra*.

Next defendant argues that the trial court erred by failing to instruct the jury on lawful arrest and that *Ventura*, *supra*, should not be retroactively applied in this case. We review claims of instructional error de novo. *People v Hubbard* (*After Remand*), 217 Mich App 459, 487; 552 NW2d 493 (1996). Generally, whether a judicial decision should be limited to prospective application is a question of law that we review de novo. *Adams v Dep't of Transportation*, 253 Mich App 431, 434-435; 655 NW2d 625 (2002). However, because defendant failed to preserve this argument for appeal, he must show that any error was plain and affected his substantial rights. *Carines*, *supra* at 763-764.

"This Court reviews jury instructions as a whole to determine if the trial court made an error requiring reversal." *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues for trial and sufficiently protect the defendant's rights." *McLaughlin*, *supra* at 668. "Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction." *Canales*, *supra* at 574.

The trial court did not instruct the jury that lawful arrest was an element of MCL 750.81d. MCL 750.81d(1) became effective in 2002, and replaced the former resisting and obstructing statute, MCL 750.479. *Ventura*, *supra* at 374. In *Ventura*, *supra*, this Court held that a lawful arrest is not an element of resisting and obstructing a police officer. *Id*. at 376. The *Ventura* Court noted: "[I]t has been long-standing law in Michigan that under the common law and the earlier resisting arrest statute, MCL 750.479, that 'one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest.'" *Id*. at 374, quoting *People v Krum*, 374 Mich 356, 361; 132 NW2d 69 (1965). The *Ventura* Court concluded that by enacting MCL 750.81d, our Legislature made an "obvious affirmative choice to modify the traditional common-law rule that a person may resist an unlawful arrest." *Id.* at 376-377. Accordingly, based on plain language of the statute and *Ventura*, *supra*, the trial court properly refused to instruct the jury that lawful arrest is an element of MCL 750.81d.

Defendant also argues that *Ventura, supra*, should not be given retroactive effect and applied to his trial because it was decided after his arrest. "Generally, judicial decisions are given full retroactive effect." *Adams, supra* at 435. The prospective application of judicial

decisions is generally limited to decisions which overrule *clear and uncontradicted* case law. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587; 702 NW 2d 539 (2005). Here, the new version of MCL 750.81d was enacted two years prior to defendant's arrest. *Ventura*, *supra* at 374. The *Ventura* Court did not overrule clear and uncontradicted case law, but rather interpreted a newly enacted statute. *Id*. at 375. As the *Ventura* Court concluded, the language of the statute clearly and unambiguously does not require lawful arrest. *Id*. at 375-376. Accordingly, the change to Michigan's resisting and obstructing statute and the abolishment of a defense based on resisting unlawful arrest came about by Legislative action in 2002, and not as a result of this Court's decision in *Ventura*, *supra*. Even without the decision in *Ventura* the meaning of the statute was plain and readily ascertainable by the trial court. The trial court did not commit error, much less plain error, in failing to apply *Ventura*, *supra,* retroactively.

Finally, defendant agues that his sentence violates *Blakely v Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004). In *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004), a majority of the Justices of the Michigan Supreme Court opined that *Blakely, supra*, is inapplicable to guidelines scoring in connection with indeterminate sentencing in Michigan. *Id*. at 730-731 n 14 (Taylor, J., joined by Markman, J.), 741 (Cavanagh, J.), 744 (Weaver, J.). We are bound by the statement in *Claypool*, *supra*. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004). Defendant is not entitled to resentencing.

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio